IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 29 OF 2000

Village Panchayat
of Usgao-Gangem,
Panchayat House,
Usgao, Goa,
Through its Deputy
Sarpanch. ... Appellant

versus

1. Mr. Luis Francisco Rodrigues,
   Advcate & Landlord, of full
   age, and his wife,

2. Mrs. Maria Luiza Horge
   Rodrigues, housewife & landlady,
   of full age,
   Both residing near Municipal
   Building, Ponda, Goa.

3. Ms. Piedade Rodrigues,
   Housewife & landlady,
   of full age,
   widow of Mr. Roque A. X.
   Rodrigues, residing at
   Sonarbag, Usgao, Ponda
   Taluka and their heirs.

4. Mr. Ricardo Rodrigues,
   and his wife,

5. Ms. Sunita Rodrigues,
   both residing at
   S. Bras Gaundalim,
   Ilhas, Goa.

6. Mr. Arnold Rodrigues,
and his wife,

7. Ms. Sanita Rodrigues,
both residing with the
Respondent No.3

8. Mr. Peter Rodrigues,
and his wife,

9. Ms. Ivy Rodrigues,
both residing with the
Respondent No.3,

10. Fr. Mateus Rodrigues,
Priest, Rachol Seminary,
Rachol, Salcete, Goa.

11. Mr. Bosco Rodrigues,
Advocate,
And his wife,

12. Ms. Ivette Rodrigues,
both residing at
May Flower Apartment,
Near Mount Carmel Chapel,
Ponda, Goa.

13. Ms. Meena Furtado
and her husband,

14. Mr. Edwin Furtado,
Advocate,
Both residing at
St. Mary's Colony,
Miramar, Panjim, Goa.

15. Ms. Neena Rodrigues,
spinster, residing with
Respondent No.3, at
Sonarbag, Usgao, Goa. ... Respondents

Mr. S. D. Lotlikar, Senior Advocate with Ms. Shreya Naik, Advocate for the Appellant.

Mr. U. S. Kolwalkar, Advocate for the Respondent Nos.1 and 2.

Mr. Arun Bras De Sa, Advocate for the Respondent Nos.3 to 15.

CORAM : N. A. BRITTO, J.

DATE : 10TH MARCH, 2006.

ORAL JUDGMENT

This second appeal has been filed by defendant no.1 in Special Civil Suit No.33 of 1996, and, was admitted on three substantial questions of law, by Order of this Court dated 14-7-2000, one of which reads as follows:-

> "Whether in view of the concurrent findings rendered by the Courts below, namely that the respondent nos.1 and 2 (plaintiffs) had failed to establish the extent of their property and consequently failed to establish that there was any encroachment, and if so to what extent in their property, the suit could still be decreed for the removal of the

road at the instance of the respondent nos.1 and 2 (plaintiffs)?"

2. I have heard Mr. S. D. Lotlikar, the learned Senior Counsel on behalf of the appellant/defendant no.1, Mr. U. S. Kolwalkar, the learned Counsel on behalf of the respondent nos.1 and 2 and Mr. Arun Bras De Sa, the learned Counsel on behalf of the respondent nos.3 to 15. In fact, the respondent nos.3 to 15(original defendant nos.2 to 14) support the case of the appellant/defendant no.1.

3. The parties hereto shall be referred to in the names as they appear in the cause title of the said civil suit.

4. There is no dispute that the plaintiffs and defendant nos.2 to 14 belong to a common ancestors/common parents upon whose death inventory proceedings No.11/69 were held and in the said inventory proceedings the plaintiffs were allotted verba/item no.9 namely a building or a residential house existing in the property "Tiscoto Voril Tucdo" while defendant nos.2 to 14 were allotted verba/item no.10 namely the said

property known as "Tiscoto Voril Tucdo". The said property "Tiscoto Voril Tucdo" has been surveyed under no.21/1 of Village Usgao.

5. Although the plaintiffs were allotted the said verba/item no.9 consisting of a building or a residential house existing in the said property surveyed under no.22/1 when the question of giving its possession came up, it was decided, by the learned Civil Judge, Senior Division by Order dated 15-2-1975 that the plaintiffs had a right to enter into possession of the said house and that the same should be handed over to the plaintiffs with appurtenances(Serventias) that are found identified or demarcated with stone wall fence or other marks. The plaintiffs have produced a document of handing over possession dated 23-4-1975.

6. As far as these appurtenances/Serventias are concerned, the learned Civil Judge, Senior Division whilst deciding Issue No.1 came to the conclusion that the plaintiffs had failed to prove the extent of the said appurtenances, and, needless to observe and rightly pointed out by the learned

Senior Counsel Mr. Lotlikar, the findings of fact have been confirmed by the learned first appellate Court in para 13 of her Judgment by observing that the trial Court properly applied its mind to the matter ... etc. In other words, the finding of fact that the plaintiffs had failed to prove the extent of their appurtenances in addition to the house allotted to the plaintiffs was not proved by the plaintiffs.

7. There is also no dispute that the road which has been constructed has been constructed at a distance of about half a meter or so from the steps of the house of the plaintiffs. However, it is interesting to note that this road has been constructed with the consent of defendant nos.2 to 14 and by defendant no.1(appellant) with proper resolutions taken at its meeting. It has been submitted by Mr. U. S. Kolwalkar that there was no road and that there was only a way and, therefore, defendant no.1 was entitled to construct a road at a place where there was none. Mr. Kolwalkar next submits that if at all defendant nos.2 to 14 had no objection it was for the purpose of tarring the said road only.

8. We have already seen that it is only verba no.9 consisting of the residential house that was allotted to the plaintiffs while verba no.10 consisting of the remaining property was allotted to defendant nos.2 to 14. It is true that at the time when the plaintiffs were to be put in possession of the said house, the learned Civil Judge, Senior Division expanded the scope of allotment that by Order dated 15-2-1975 so as to include appurtenances which were identifiable or demarcated by stone wall. Mr. Kolwalkar submits that on 23-4-1975 when the plaintiffs were put into possession they were put into possession of a latrine, a well and a garden in front of the house of the plaintiffs. This submission cannot be accepted. As can be seen from memorandum of possession dated 23-4-1975 what the plaintiffs were put in possession is the house, the latrine/toilet and right to use the water from the well and nothing more. Nevertheless, in my view, once the learned trial Court had given a finding that the extent of the appurtenances of the plaintiffs could not be determined for want of evidence and the said finding having not been challenged by the plaintiffs and on the contrary having been confirmed by the learned first appellate Court, it is rather too late in the day for the plaintiffs, to

contend now that they had a garden in front of the house of which they were also put in possession.

9. In the light of the concurrent findings of facts that the plaintiffs had failed to prove the extent of the appurtenances, both the Courts below could not have decreed the suit of the plaintiffs and ordered by way of mandatory injunction the removal of the said road and the restoration of the property in favour of the plaintiffs more so when the rest of the property Tiscoto Voril Tucdo(verba/item No.10) was allotted to Defendant Nos.2 to 14 and with their consent that Defendant No.1-Village Panchayat had constructed the said road.

10. Consequently, the appeal deserves to succeed. The Judgments/Orders of both the Courts below are hereby set aside and consequently the suit filed by the plaintiffs is dismissed. Considering the facts, no costs.

N. A. BRITTO, J.

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